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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 423

ANTHONY BARATTA,
Petitioner,

—against—

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING OF DENIAL OF CERTIORARI

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TABLE OF CONTENTS

PAGE

I—Introductory 1

I—The Miranda-Walder issues as affected by the latest case law 4

III—The cumulative effects of (1) the Miranda violation, (2) the Government's conduct in obscuring the date of the arrest and search which misled the defense and the District Court into thinking that there was a valid arrest warrant, and (2) the high-water-mark extremeness in the reach of the search power here exercised (search of a private home without either an arrest warrant or a search warrant) 11

CONCLUSION 17

Certificate of Counsel 18

Appendix to Petition for Rehearing—Decision of United States Court of Appeals, 2d Cir., in United States v. Fox and Norber 19

Cases Cited

Draper v. United States, 358 U. S. 307 ..... 13, 17

Giles v. United, 284 Fed. 208 (C. C. A. 1, 1922) 12

Giordenello v. United States, 357 U. S. 480 ..... 13fn

Groshart v. United States, 392 F. 2d 172 (C. A. 8, 1968) 2-4, 4fn, 5, 10, 11, 17

Proctor v. United States (C. A. D. C., decided October 10, 1968) 2-4, 4fn, 5, 10, 11, 17

United States v. Fox (decided October 18, 1968) 3-5, 7, 10, 11, 17

PAGE

United States v. Hall, 348 F. 2d 837 (C. A. 2, 1965), cert. denied, 382 U. S. 497 ..... 12, 17

United States v. Provoo, 215 F. 2d 531 (C. A. 2, 1954) 8

Walder v. United States, 347 U. S. 2, 4, 5, 7, 9-11, 17

United States Constitution Cited

Fourth Amendment 13, 13fn, 16

Statutes Cited

8 U.S.C.:

Sec. 1324 ..... 13fn

Sec. 1357 ..... 13fn

14 U.S.C.:

Sec. 89 ..... 13fn

18 U.S.C.:

Secs. 3052-3056 ..... 13fn

26 U.S.C. (Narcotic Control Act of 1956):

Sec. 7607 ..... 12, 13, 13fn, 15, 16

Sec. 7608 ..... 13, 13fn

Rule Cited

Rule 58(2) 2, 18

Other Authorities Cited

102 Congressional Record (84th Congress, 2nd Session):

pp. 7284, 7285, 9014, 9016, cols. 1-2 ..... 14, 14fn

p. 9017, 9020 15

PAGE

Daniel, "Report of Inter-departmental Committee on Narcotics to the President (February 1, 1956)"... 14

House Report No. 2388, 84th Congress 2d Session, printed in U. S. Code Congressional and Administrative News (84th Congress 2d Session, 1956):

pp. 3274, 3283 15

Report, Sub-committee on Improvements in the Federal Criminal Code of the Senate Judiciary Committee 14fn

Senate Bill 3760:

Sec. 1408 ..... 14fn

The Criminal Law Reporter, October 24..... 2

The Criminal Law Reporter, November 6..... 3

3 Wigmore on Evidence (3d ed.):

p. 113, Secs. 758-765..... 8

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I. Introductory

Our petition for certiorari in this case was denied November 12, 1968, the order of denial stating that "Mr. Justice Douglas is of the opinion that certiorari should be granted".

Petitioner Anthony Baratta hereby respectfully petitions for rehearing of the order denying certiorari. As will appear, we believe that this petition for rehearing complies with Rule 58(2) because it is prompted by "in-

tervening circumstances of substantial * * * effect", consisting of very recent further developments in the case law relating to this case (*infra*); and also because certain "other substantial grounds available to petitioner although not previously presented" justify the filing of this petition for rehearing in that such "other substantial grounds" have come into focus by virtue of those recent case law developments.

Our petition for certiroari argued that *Walder* v. *United States,* 347 U. S. 62 does not justify the use of an admittedly *Miranda*-banned statement which the prosecution used in this case to refresh the "recollection" of petitioner Baratta when he took the stand in his own defense; and that the *Miranda* violation here is not obviated by the fact that the *Miranda*-banned statement was not introduced in evidence but was used ostensibly only to "refresh recollection".

The Court of Appeals, in affirming petitioner Baratta's narcotics conviction, reasoned that it was not necessary to reach the *Miranda-Walder* issue because the *Miranda*-banned statements had not been introduced in evidence but had been used only to "refresh recollection" (Pet. Cert., App. 11a-15a).

The latest case law developments above mentioned relate to the *Miranda-Walder* issue. The chronology of these latest case law developments, with reference to the within certiorari proceeding, is as follows:

Our petition for certiorari was filed August 20, 1968. Certiorari was denied, as above mentioned, on November 12, 1968. On October 27, 1968 we mailed to the Clerk of this Court ten copies of a covering letter with ten photocopies of the decision in *Proctor* v. *United States,* C. A. D. C., decided October 10, 1968; we had first learned of the *Proctor* decision in the October 23, 1968 issue of *The Criminal Law Reporter* which we received on October 24.

At the time we sent to the Clerk our above mentioned letter of October 27, 1968 with the *Proctor* photocopies, it was our information, from the Clerk's Office, that the Court was scheduled to confer on our petition for certiorari on November 1, 1968.

Then, on November 8, 1968 we received another issue of *The Criminal Law Reporter* (issue of November 6) reporting the Second Circuit decision of *United States* v. *Fox*, decided October 18, 1968. The date November 8, 1968, when we first learned of the *Fox* decision, was the Friday before the Armistice holiday. Having been informed as aforesaid that our petition for certiorari was scheduled for conference of the Court on November 1, 1968, there appeared to us on November 8 to be no way of bringing the *Fox* decision to the attention of the Court unless it were to come about that the Baratta petition for certiorari would not be disposed of at the Court's then next scheduled decision day, November 12, 1968; it was our thought that if the Baratta certiorari petition were not disposed of on November 12 we would send the new *Fox* decision to the Court; but then on November 12 the Court did deny certiorari in this case as above stated.

The specific "intervening circumstance", then, which has a part in occasioning this petition for rehearing is the very recent handing down of the *Fox* decision of the Second Circuit. The text of the *Fox* decision is printed as an Appendix to this petition for rehearing.

When previously (October 27, 1968) we sent to the Court the photocopies of the *Proctor* decision of the District of Columbia Circuit, *supra*, we were not permitted to argue or discuss that decision, under the practice of which the Clerk advised us, that such argument or discussion may not be included in a letter form of submission but is permitted only *via* compliance with the Rules as to

printing. Since the *Proctor* decision deals with the same relevant topic as does the *Fox* decision, and since it appears proper for us now to argue and discuss the *Fox* decision in this petition for rehearing, we trust that the Court will permit us also to argue and discuss herein the identical topic in *Proctor*.

II. The *Miranda-Walder* issues as affected by the latest case law.

Fox and *Proctor* both hold that the *Miranda* exclusionary principle overrides the *Walder* permissive principle of "collateral" impeachment; that is, *Fox* and *Proctor* hold that *Miranda*-banned statements may not be used as the basis of *Walder*-type collateral impeachment of a defendant who takes the stand in a criminal case. The reasoning of *Fox*, indeed, is that *Miranda* operates plenarily to ban statements obtained in violation of *Miranda*, *i.e.*, that it is not feasible to try to differentiate any longer, for *Walder* purposes, between (1) "collateral" and impeachment issues and (2) "direct" issues of a defendant's claim of guilt or innocence when he takes the stand (see pp. 3588-3589 of the pagination of the slip opinion in *Fox*, Appendix hereto *infra*).

Fox cites, as having "reached the same conclusion as we do here" (*id.*, p. 3588), the decision in *Groshart* v. *United States*, 392 F. 2d 172 (C.A. 9 1968).*

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* The Ninth Circuit decided *Groshart* March 27, 1968. We are embarrassed that we missed finding the *Groshart* decision before now and that we did not learn of it until we saw the *Fox* decision. We apologize to the Court for not having sooner found the *Groshart* decision, which is in our favor and which we surely had no motive to omit. We do not print the *Groshart* decision in our Appendix hereto, *infra*, because it is officially reported (*supra*); nor do we include in the Appendix hereto the text of the *Proctor* decision, because, as above said, ten copies of that decision were sent to the Court by our covering letter of October 27, 1968.

Thus, it has been held by three Circuits—Second, Ninth and District of Columbia—that *Miranda* overrides *Walder* in the matter of *Miranda*-banned statements.

Let us say at once that we realize all three of those decisions—*Groshart, Proctor, Fox*—involved actual reception in evidence of *Miranda*-violative statements whose evidentiary reception was sought by the Government to be justified under *Walder*, whereas our case involves *Walder* use of a *Miranda*-violative statement to "refresh recollection" rather than as actual evidence received on the record. But we do not think that this supposed distinction between the technical evidentiary record posture in our case and that in *Groshart-Proctor-Fox* with respect to the *Miranda-Walder* problem, is significant.

On the contrary we think this supposed distinction—between *Walder*-based outright evidentiary reception of a *Miranda*-banned statement and ostensible use of such a statement to "refresh recollection"—poses a danger to the *Miranda* principle that is even more insidious than would be the danger of direct assaults against the evidence-exclusion rule of *Miranda*.

For, it does not require much imagination on the part of a realistically minded Judge or lawyer to see what will inevitably happen if police and prosecutors are assured—as the thus far unreversed decision of the Second Circuit in our present case assures police and prosecutors—that they do not need to worry anymore about *Miranda* violations so long as they do not use the tainted evidence at trial, *i.e.*, so long as they use the tainted evidence "only" for such purposes as confrontation of a defendant at trial under the formula ("guise" is the better word) of "refreshing recollection" (as a preliminary to "rebuttal").

Once a decision such as that of the Court below in our case stands lodged on the books, *i.e.*, stands finally unreversed by this Court (as is the present posture of this

case in view of the denial of certiorari herein), what possible *Miranda* "deterrence" can further operate among our police and prosecutive establishments—on the one "deterrence" level that counts most, the day-to-day police-prosecutive functional level of custodial interrogation of persons suspected or accused of crime?

How can a prophylactic rule like the *Miranda* rule be enforced, how can one hope such a rule will get respectful obedience from policemen and prosecutors, on the stand-or-fall functional day-to-day "law enforcement" level throughout the innumerable police-prosecutive custodial enclaves of this country, when policemen and prosecutors are told by the Courts that, despite *Miranda*, there remains open to them a comfortably amorphous range of opportunity to exploit investigative or prosecutive advantage from *Miranda*-banned statements so long as the officers stop short of introducing such statements in evidence at the trial?

Short of such evidentiary use at trial, every policeman and prosecutive officer in the United States today stands assured—by the unreversed decision of the Court below in this case—that *Miranda*-tainted statements may be used as investigative "leads", and even as confrontational items in Court in the form of "exhibits for identification".

We repeat, not only does the unreversed decision of the Court below undermine *Miranda's* deterrence policy, but it affirmatively, irresistibly, tempts policemen and prosecutors to violate *Miranda*, deliberately, on the theory that they have nothing to lose and everything to gain in at least a substantial percentage of cases. This irresistible temptation will exist every time a policeman or prosecutor calculates that by *complying* with *Miranda* he will not get valuable admissible evidence anyhow (nothing to lose), and that by *violating Miranda* he will or may at least get "leads" and the right of "refreshing recollection" at trial (everything to gain).

The Court below itself acknowledged that "* * * we can certainly conceive of situations where the use of an improperly obtained statement, not itself admitted into evidence or read to the jury, would violate *Miranda* * * *" (Pet. Cert., App. 13a). However, the Court below went on to reason that error if any in this regard in the present case was harmless because Baratta's *Miranda*-banned admission that he had used the name Barrone was "merely cumulative to the massive documentary evidence on this point that was offered by the Government in rebuttal" (*ibid.*). And, it will be recalled, the Court below also held that this "massive documentary evidence" was constitutionally received in evidence at the trial because it was obtained in a search incident to a valid arrest which, though warrantless, was found by the Court below to have been "supported by an abundance of probable cause in the form of the information supplied by Bermudez and his fellow narcotic agents, and hence was lawful even without a warrant" (*id.*, 14a-15a).

Notwithstanding this reasoning of the Court below to the effect that any *Miranda* violation here was rendered insignificant by the products of the search which the Court found lawful, and notwithstanding that the Court below on this reasoning found it unnecessary to reach the *Walder* "collateral" impeachment issue in relation to *Miranda*, we herewith respectfully press our contention that *Miranda* overrides *Walder*, that this conclusion is now authoritatively supported by *Fox-Proctor-Groshart*, and that the primacy of *Miranda* over *Walder* justifies the granting of certiorari on our facts. Our reasons for pressing this position notwithstanding the conclusion of the Court below that the evidence obtained from the search deprives the *Miranda-Walder* issue of significance here, will be stated *infra*, after first noting the following additional facets of the issue of the so-called non-evidentiary use of the *Miranda*-banned statement for the ostensibly sole purpose of "refreshing recollection":—

The Court below said (Pet. Cert., App. 13a), "It is basic evidence law that a witness' recollection may be properly refreshed by writings and papers which are not in themselves admissible in evidence, *e.g.*, 3 *Wigmore on Evidence* §§758-765 (3d ed.) * * *". A reading of the cited sections of *Wigmore* reveals that the situation is considerably more complicated than one might infer from the easy phrase "basic evidence law" tossed off by the Court below in the portion of its opinion just quoted. For, in his §764 entitled "Cross-Examiner's Use of Writing To Revive Recollection", *Wigmore* lays down the positive, unequivocal requirement that when such "refreshing of recollection" process is enacted by a *cross-examining* party and the witness is forced by the Court to comply with the *cross-examiner's* requests, "* * * the paper so used must in fairness be *read aloud* or shown to the jury" (*Wigmore on Evidence* §764, 3d ed., vol. III, at p. 113—italics in original). But since in our case it is undisputed that the *Miranda*-banned statement used to "refresh recollection" could not be "read aloud or shown to the jury" precisely because it *was Miranda*-banned, then does it not follow that, under "basic evidence law", it was absolutely improper to resort at all to the device of "refreshing recollection" in this situation?

Furthermore, in the "Pocket Supplement" for *Wigmore's* §764 the author commences by adding a new paragraph to his first footnote for that §764, reading, "Distinguish the improper use of such memorandum for the purpose of impeachment under the pretext of refreshing the recollection of the witness", citing Federal and State authorities, including especially *United States* v. *Provoo,* 215 F. 2d 531 (C. A. 2, 1954) (disapproving use of army record to impeach testimony of defendant "under guise of 'refreshing his recollection' ").

Thus, the Court below in simplistically reasoning that "it is basic evidence law that a witness' recollection may

be properly refreshed by writings and papers which are not in themselves admissible in evidence", simply overlooked the whole cardinal distinction in this branch of the law of evidence as between witnesses on *direct examination* and witnesses on *cross-examination*. Baratta was being examined by the prosecutor on cross-examination when the *Miranda*-banned statement was used to "refresh his recollection". Can there be any doubt that this cross-examination of Baratta was an instance, as *Wigmore* has put it (*supra*), of "the improper use of such memorandum for the purpose of impeachment under the pretext of refreshing the recollection of the witness"? And, again, was it not a perversion of the whole "refreshment of recollection" theory to use that theory in the *cross-examination* setting where the indispensable concomitant of reading aloud or showing the statement to the jury was impossible as a matter of law?

When it is remembered, again, that the prosecutor's purpose in our case was to use the *Miranda*-banned statement as the opening wedge in an effort to justify "rebuttal" by resort to search-obtained evidence which the prosecution itself at that stage obviously deemed inadmissible except *via* the *Walder* "collateral impeachment" gimmick, the abuse of the supposed "basic evidence law" practice of "refreshing recollection" emerges the more offensively.

Here, then, is a perfect example of the newly portended general subversion of *Miranda* by giving police and prosecutors irresistible temptation to defy *Miranda* knowing that they have nothing to lose and something of real "value" to gain.

One other facet of the *Miranda-Walder* problem which deserves further comment here—before we take up the further questions as to the supposed effects of the search-obtained evidence in palliating the *Miranda* violation

herein—is the facet of just what is supposed to have been the *materiality* anyhow of Baratta's alleged use of the name "Barrone". It will be recalled that the Government wanted to use the *Miranda*-banned statement to "refresh the recollection" of Baratta regarding "Barrone". As we noted in our petition for certiorari (p. 36, fn.), the Government has been arguing that it desired this item to help it rebut Baratta's assertions of financial hardship, *i.e.*, Barattas' trial testimony that the reason he met with the narcotics seller Verzino was to borrow money not to help sell narcotics. In this Court the Solicitor General has apparently argued that this purpose of rebutting Baratta's claim of impoverishment was the Governments' sole purpose in using the *Miranda*-banned "Barrone" item (Mem. in Opp. p. 2). We have argued (Pet. Cert., *passim*) that the Government's real and obvious purpose was to depict Baratta as a guilt-conscious fugitive living under an alias, which the Government evidently could not prove by fair means and so tried to prove through the back-door methods of the *Miranda*-banned "Barrone" item and the derivatively "rebuttal"-introduced search items. We also noted in the petition for certiorari (p. 36, fn.) that the Court of Appeals has apparently not expressly approved the Government's suggestion that it was interested in disproving Baratta's poverty rather than in improperly insinuating fugitivity. We would therefore now re-emphasize that between the time of Baratta's incident of financial neediness at the meeting with Verzino (September 1963) and the time of the arrest and the *Miranda*-banned interrogation (July 1964), there was a lapse of nearly one year. This lengthy time lapse makes it very difficult to justify the *Miranda*-banned "Barrone" interrogation at trial based on the July 1964 statement as being "material" to the issue of "rebuttal" of Baratta's claim of having been impoverished nearly a full year earlier. In any event, *Fox-Proctor-Groshart, supra*, treat *Miranda* as dissolving all or any *Walder* distinctions between "collateral" and "direct" items, as we previously noted.

III. The cumulative effects of (1) the *Miranda* violation, (2) the Government's conduct in obscuring the date of the arrest and search which misled the defense and the District Court into thinking that there was a valid arrest warrant, and (3) the high-water-mark extremeness in the reach of the search power here exercised (search of a private home without either an arrest warrant or a search warrant).

Were it not for the prominent recent emergence of the *Miranda* protections as overriding the *Walder* case—as declared in the *Groshart, Proctor* and *Fox* decisions, *supra*—we would hardly have felt justified in invoking the re-hearing powers of this Court with reference to the search aspects of this case. But because the *Miranda* point seems to us so compelling under the latest Federal Circuit decisions including especially *Fox,* and because, if we may indulge in the Lutheran figure of speech, "we can do no other" than to try to keep nailing to the *certiorari* door-post of this Court our "thesis" that the overall conduct of the Government in this case has effected, albeit intricately, a subversion of the *Miranda* protections, we are obliged to say a few words in this petition for re-hearing concerning the search aspects as such, *i.e.,* as distinct from the *Miranda* aspects as such.

So far as we know, there is no decision of this Court which approves a search in a family's permanent private residence, where there was neither an arrest warrant nor a search warrant. We do not understand the seemingly axiomatic acceptance by the Court below of the idea that, without an arrest warrant and without a search warrant, police may search a man's private home so long as they have "probable cause" to arrest him on a charge of felony. Allowing the doctrine of arrest-incident search to operate in this unlimited way, where arrest moreover is without benefit of a warrant, is to cre-

ate a "very dangerous amalgamation of powers". (*Giles v. United States*, 284 Fed. 208, 214 (C. C. A. 1, 1922).

The Court below cited, as its sole authority for this arrest-search power, the case of *United States* v. *Hall*, 348 F. 2d 837, 841 (C. A. 2, 1965), *cert. denied* 382 U. S. 497. Supplementing our discussion of the *Hall* case in our petition for *certiorari* (p. 41), we would now note that the warrantless arrest in *Hall* was in an automobile on the highway, and the warrantless search was of the defendant's person and the automobile; there was no search of a private home. In fact, the *Hall* case apparently did not even involve a defense challenge to the physical search, but only to the taking of certain verbal statements after the arrest, the defense contending that the arrest warrant used was invalid (which the Government conceded), the Government justifying the arrest as based on reasonable cause to believe that Hall had committed a felony, and Hall conending that this is not enough when the Government had time to obtain a warrant and that the existence of such time was conclusively demonstrated by the Government's having done so. Thus, *Hall* affords no authority for the sweeping proposition that a warrantless search of a private home incident to a warrantless arrest is lawful upon the arresting officers' having probable cause to make the arrest without a warrant. Nor, again, do we know of any other decision—nor did the *Hall* decision cite any—in support of this strange claim of arrest-search power.

It should be noted that the Court below did not adduce—nor has the Government done so in this case—the no-warrant arrest authority of 26 U.S.C. §7607 which allows narcotics agents this power. It is not surprising that the latter statute has not been invoked in this case, when the text of the statute, and its legislative history are considered. The statute allows narcotics arrests without warrant "where the violation is committed in

the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation". The test of "reasonable grounds" under this statute is, of course, the same as that for "probable cause" under the Fourth Amendment. *Draper v. United States*, 358 U. S. 307, 310, fn. 1. This legislation, then, gives narcotics officers no greater arrest powers than the Fourth Amendment gives them; and, needless to say, it gives them no search powers except such as may tack onto a Fourth Amendment-permitted arrest.* There is no decision by this Court approving search of a private home as an incident to a warrantless arrest under §7607 (or under any comparable no-warrant legislation, such as 26 U.S.C. §7608).

As for the legislative history of §7607: The legislative history of the Narcotic Control Act of 1956 (26 U.S.C. §7607) confirms that Congress had no intention of creating a form of the arrest power that would mark any new extension whatsoever into the area protected by the Fourth Amendment. On the contrary, the legislators were told by the chief sponsor of the bill that narcotic agents were simply to be given powers of warrantless arrest equivalent to those already permitted to other federal officers.** Thus, in presenting the legislation on

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* The Fourth Amendment requirement of probable cause applies, of course, to both arrest and search warrants. *Giordenello v. United States*, 357 U. S. 480, 485-486.

** The Narcotic Act arrest provision in question is therefore to be deemed to have been modeled after statutes none of which import any power of arrest inconsistent with the "probable cause" requirement of the Fourth Amendment. Those statutes are 8 U.S.C §1357 (in connection with which see 8 U.S.C. §1324) (immigration and naturalization officers); 14 U.S.C. §89 (Coast Guard); 18 U.S.C. §3052 (F.B.I.) and §3053 (United States Marshals) (see also 18 U.S.C. §3054-§3056, inclusive); 26 U.S.C. §7608 (Internal Revenue Officers).

the floor of the Senate, Senator Daniel stated, concerning the new arrest provision, not only that "the purpose is to give these law enforcement officers status comparable to that now held by agents of the Federal Bureau of Investigation and other federal enforcement officers", but he also went much farther in reassuring the Senate by depicting the provision as one limited to a right to "make arrests without warrant for violations *committed in their presence*". 102 Congressional Record (84th Congress, 2nd Session) 7284.* Senator Daniel also obtained leave to read into the record a "Report of Inter-departmental Committee on Narcotics to the President (February 1, 1956)," which made it particularly explicit that the prime purpose of the sponsors of the proposed new arrest provision for narcotics cases was to enable the agents to deal effectively with those violations as to which emergency action is necessary: "Even the shortest delay incident to obtaining a warrant from a magistrate under the most favorable cir-

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* Senator Daniel was speaking of the bill S. 3760, whose section 1408 was in all substantial respects identical with the law as finally adopted. 102 Congressional Record, p. 7285. In connection with Senator Daniels' above noted over-simplified description of the proposed provision as one seemingly dealing only with violations committed in the presence of narcotic agents, see the inartistic language of a report by the Sub-committee on Improvements in the Federal Criminal Code of the Senate Judiciary Committee, which was read into the Congressional Record during the debate, and where the following peculiarly-phrased statement appears: "* * * when federal agents see the violation occur or have probable cause to believe that it is occurring, and in cases of consent searches, the agents should be permitted to make arrests without search [*sic*] warrants, * * *". 102 Congressional Record 9014, columns 1-2. Later in the debate, Senator Daniel again told the Senate that the purpose of the proposed new arrest provision was to allow narcotic agents "to proceed in the way that other law enforcement officers are now required to do". 102 Congressional Record 9016.

cumstances would be fatal to many narcotic cases. Much of the business is in neighborhoods where alarms are quickly spread; much of the activity of narcotic criminals is in the nighttime and on weekends, or at other times when a magistrate cannot be reached without delay." 102 Congressional Record 9017, at 9020.* The reports of the Senate and House Committees, and of the Conference Committee, shed no further significant light on the legislative intent, with the single exception of House Report No. 2388 which echoed the idea that the proposed new arrest (and search) provisions were needed to deal with emergency situations: "* * * the enforcement officers have been required to secure an arrest warrant even though circumstances indicate the impracticability of such a procedure. The delay involved in obtaining the warrant permits the destruction or removal of the narcotic evidence and allows the narcotic traffickers to escape prosecution for their crime. * * *" House Report No. 2388, 84th Congress 2d Session, printed in U. S. Code Congressional and Administrative News (84th Congress 2d Session, 1956) pp. 3274 at 3283.

The foregoing is believed to be all of the legislative history material that is of pertinence for present purposes.

Both the text and the legislative history of 26 U.S.C. §7607, then, and the few pertinent judicial expressions which have appeared on the subject, point inescapably to the conclusion that this provision for narcotic arrests without a warrant was never intended to place in the hands of the narcotic agents an untrammeled discretion-

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* While the statement above last quoted may ambiguously have referred to both search warrants and arrest warrants, the distinction was not made clear in the text of the quoted report. The fact remains that the legislators were being told that the proposed new powers were needed for emergency cases.

ary authority to utilize such arrest powers indiscriminately in any case where probable cause exists to believe that an offense has been committed, irrespective of its remoteness in time, or irrespective of all other surrounding circumstances of the case which would favor applying for a warrant. The legislative intent could scarcely be more explicit that the new power was being given to narcotic agents in order to meet the practical necessities of those cases where the obtaining of an arrest warrant might not be readily feasible or safe and the quarry might escape apprehension in the meantime.

It would, therefore, appear that the mere existence of 26 U.S.C. §7607—or of any comparable supposed general no-warrant "probable cause" power— cannot exert one iota of legal force to validate an arrest and an arrest-incident search of a private home which would be violative of the Fourth Amendment. The Fourth Amendment does not countenance the fearsome "amalgamation of powers" that is portended by the use in this case of a power of warrantless search of a private dwelling incident to a warrantless arrest.

Even though neither the Government nor the Courts below have referred to the no-warrant narcotics arrest legislation (26 U.S.C. §7607), we have above devoted some discussion to that legislation because of the analogy which that legislation affords to the strange, generalized power of warrantless arrest plus incident private-home search which the Government and the Court below assert in this case. The narcotics arrest legislation (§7607) may be taken as a specific instance of the kind of warrantless arrest power (for probable cause) relied on by the Government and the Court below in this case; but those assertions here include also a power of warrantless search in private dwellings. Neither judicial precedent in this Court, nor the legislative history, with respect to §7607, give any support to those

assertions. Nor, again, do we know of any other legal support for those general assertions, except the decision of the Court below and its inapt citation of *United States* v. *Hall, supra.*

When this Court in *Draper* v. *United States,* 358 U. S. 307, approved a narcotics arrest and search under §7607, without any warrant, the facts did not involve search of a private home, but instead search of the immediate person of the party who was arrested without a warrant. To our knowledge, no other decision of this Court has gone farther than *Draper* in allowing amalgamation of the warrantless arrest-search power.

We therefore respectfully urge that, especially in the light of the cumulative constitutional effects here involved in regard to the inter-connections between the *Miranda-Walder* issues of this case and its Fourth Amendment issues, the Fourth Amendment issues as such are deserving of re-hearing—and we again respectfully re-emphasize that the sharpening of constitutional focus on our within *Miranda-Walder* issues, a sharpening which has come about through the Circuit decisions in *Fox-Proctor-Groshart,* additionally favors re-examination of the Fourth Amendment issues herein.

CONCLUSION

It is respectfully prayed that this petition for re-hearing of the denial of certiorari should be granted.

Respectfully submitted,

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Anthony Baratta

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in Rule 58(2) of the Rules of this Court.

ABRAHAM GLASSER
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Anthony Baratta

December 6, 1968.